In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1556

CULINARY ALLIANCE & BARTENDERS UNION LOCAL 703, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board's Trial Examiner found that an association of employers in the restaurant industry violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from the petitioner union without establishing, on the basis of objective considerations, that it had a good faith doubt as to the union's continued status as representative of a majority of the employees in the bargaining unit (Pet. App. 30-41, 45-46). He ordered the association, *inter alia,* to recognize, and upon request to bargain with, the union (Pet. App. 47). The Trial Examiner, however, declined the union's request that the employees be compensated for the wage increases and fringe benefits which arguably they would have obtained but for the unlawful refusal to bargain (a "make-whole remedy"). He noted that the Board, in

Ex-Cell-O Corp., 185 NLRB 107, had concluded that it lacked statutory authority to provide such a remedy (Pet. App. 43). He added (*ibid.*):

> Moreover, contrary to the Union's contention, it cannot be said that this case involves such a flagrant violation of the law, not to say "massive" or "aggravated" unfair labbor practices, as to warrant such a drastic remedy * * *.

The Board affirmed the Trial Examiner's findings and conclusions, and adopted his order (Pet. App. 14-15).

2. The association complied with the Board's order. The union, however, petitioned the court of appeals to review the Board's refusal to grant the make-whole remedy. The court of appeals, while reserving "the question whether the Board has the power to award such a remedy for the case in which make-whole relief would be appropriate," affirmed "the conclusion of the Board that the facts of this case do not call for a compensatory-damages remedy" (Pet. App. 5). The court noted that the Court of Appeals for the District of Columbia Circuit, which first suggested that the Board has power to provide that remedy,[1] had recognized that this remedy need not be provided "where the legality of an employer's refusal to bargain rested on a factually debatable question" (Pet. App. 4). The court added (*ibid.*):

> Here, the Board found that, while the association did not entertain a good-faith doubt of the union's majority status on the date it withdrew recognition,

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[1] See *Int'l Union of Electrical Workers* v. *National Labor Relations Board (Tiidee Products)*, 426 F. 2d 1243, certiorari denied, 400 U.S. 950.

> the association's initial impression of widespread employee dissatisfaction was borne out when approximately 94 of the 304 employees wrote letters and signed petitions disavowing the union. Under these circumstances, the Board properly could find that the association's refusal to bargain was not a "clear and flagrant violation of the law." *Tiidee Products,* 426 F. 2d at 1248. * * *

3. The first issue raised in the petition (Pet. 3)—the Board's alleged failure to state its reasons for declining to grant a make-whole remedy—is not presented here. The Trial Examiner, whose findings the Board adopted, denied a make-whole remedy on two grounds: (1) the Board lacked power to provide such a remedy; and (2) in any event, such a remedy was inappropriate in this case because the unfair labor practices were not "flagrant." The court of appeals did not reach the first ground,[2] for it found that the Board was justified in declining a make-whole remedy on the second ground.

Accordingly, the only issue really presented is whether the Board was reasonable in concluding that a make-whole remedy was not appropriate here. Such an issue, which turns on an evaluation of the particular facts, does not warrnt review by this Court. In any event, the Board's conclusion was reasonable (see *supra,* p. 2).

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[2]Thus, the second question raised by the petition (Pet. 3)—whether the Board has power to provide a make-whole remedy—is likewise not presented here because the Board found that the remedy would be inappropriate in the circumstances of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MAY 1974.